

*Arizona Supreme Court
Judicial Ethics Advisory Committee*

ADVISORY OPINION 99-04
(September 21, 1999)

Propriety of Officiating at Athletic Events

Issues

1. May a superior court judge officiate at public high school sporting events and receive compensation therefor from the school's general fund or from gate and concession receipts?

Answer: Yes.

2. May a judge officiate at sporting events for private schools and receive compensation therefor?

Answer: Yes.

3. May a judge officiate in playoff games and receive compensation therefor from the Arizona Interscholastic Association?

Answer: Yes.

4. May a judge receive reimbursement from the association for mileage expenses?

Answer: Yes.

5. May a judge officiate at sporting events for various private youth and adult leagues and receive compensation therefor?

Answer: Yes.

Facts

A newly-appointed superior court judge has officiated at various athletic contests, primarily football and ice hockey, for over 25 years. As the referee of a high school football officiating crew, the judge is responsible for organizing the crew, administering its activities, and making final on-field decisions in the event of a disagreement within the crew.

The Arizona Interscholastic Association ("AIA") administers high school athletics in Arizona. Football officials receive game assignments from the AIA. Both the AIA and the participating schools treat football officials strictly as independent contractors, not employees. Officials are free to accept or reject a proposed assignment and take no direction from school administrators, athletic directors, coaches, faculty, or other personnel as to how they perform their duties. The officials sign no contracts with any school. They provide their own health, accident, and liability insurance, and pay their own taxes. Officials pay a \$30 registration fee to the AIA each year. At the end of the season, the AIA reimburses the officials for mileage expense.

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Each year officials usually are assigned to approximately ten varsity games, eight to twelve junior varsity or freshman games, and one or two playoff games by the AIA. For regular season games, the officials are paid a “game fee” by the home school at the site before the game begins. The fee for a playoff game is paid by the AIA.

The method and source of compensation for the officials’ game fees vary. At least one school district pays the officials in cash from an auxiliary account, into which gate and concession receipts are deposited. Another school district pays officials from a student account, and all gate receipts are deposited into that account. Yet another district most always pays the officials from a gate receipts account. Occasionally officials are paid from a school district’s maintenance and operations fund, but no budgeted public monies are used to pay officials.

In addition to his football officiating activities, the judge also officiates at ice hockey games for various private youth and adult leagues. The leagues pay the Phoenix Ice Hockey Referee’s Association (“PIHRA”), a non-profit organization, for providing officials. PIHRA then pays the officials monthly for the games they officiated during the preceding month. No public funds or facilities are involved. Finally, from time to time the judge also apparently officiates youth football games that are not sponsored by or connected with any public entity, and receives a fee from a local Pop Warner Football Association.

Discussion

The judge’s primary inquiry is whether his various officiating activities and receiving compensation therefor comply with Article 6, §28 of the Arizona Constitution. That section states, in relevant part: “Justices and judges of courts of record shall not be eligible for any other public office or for any other public employment during their term of office.” Neither that section nor the few cases construing it define “public employment.” Based in part on Article 6, §28, this committee concluded that a judge could not receive compensation for teaching courses at a city college or at a state university’s criminal justice center. Opinion 79-02. We stated there that “constitutionally a judge may not accept public employment,” and “[t]eaching at a publicly funded college or university is public employment.”

Unlike the present matter, however, we assumed from the facts presented in Opinion 79-02 that the judge there was “regarded as an employee of each public educational institution” at which that judge taught. In addition, the committee concluded that “a judge could teach as a guest lecturer at a public institution but not as an employee [and] could accept an honorarium or its intended equivalent for guest lecturing on an isolated or irregular basis.”

Based on the facts presented here, we do not believe the judge’s officiating, even for sporting events at public schools, constitutes “public employment” for purposes of Article 6, §28. As for the judge’s relationship to those public schools, the classic indicia of an employee or servant relationship, most notably the school district’s control or right to control the performance of officiating services, are lacking here. *See Santiago v. Phoenix Newspapers, Inc.*, 164 Ariz. 505, 794 P. 2d 138 (1990); Restatement (Second) of Agency

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§220, at 485 (1958). The public schools at which the judge officiates football games have no contractual relationship with him, provide no benefits (other than the game fee) to him, do not assign game times and locations to him, do not direct or control his officiating duties in any way, and do not withhold taxes from the game fee paid to him. In addition, both the school districts and the AIA regard football officials as independent contractors, not employees. The judge also works on an “isolated or irregular basis,” like the guest lecturing mentioned in Opinion 79-02. Although the home school pays the officials before each game, the source of such payment is primarily, if not exclusively, gate and concession receipts rather than public funds. Even if the game fee is paid totally from the school’s general fund, however, that fact alone is insufficient to establish a “public employment” relationship under the circumstances presented here.

We further conclude that the judge’s relationship as an official to the AIA does not infringe Article 6, §28. “[The] AIA is a voluntary association composed of all public and most private high schools in Arizona [,and] formulates and promulgates rules and regulations pertaining to, among other things, interscholastic athletic competition among its members.” *Tiffany v. Arizona Interscholastic Ass’n, Inc.*, 151 Ariz. 134, 135, 726 P. 2d 231, 232 (App. 1986). According to the Arizona Attorney General’s Office:

The AIA is not the legislature; nor is it a board or commission of the state or political subdivision. The AIA also is not a multi-member governing body of a department, agency or institution of the state or of a political subdivision.
...

While the AIA is a multi-member organization it is not a governing body of an instrumentality of the state or of any political subdivision. Rather, the AIA is a private, voluntary organization in which most of its members are political subdivisions. It is a nonprofit corporation. . . .

... [T]he AIA is an organization made up of its collective membership which is independent of the State or any particular political subdivision and therefore is not an instrumentality of either.

Ariz. Op. Att’y Gen I89-010 (January 25, 1989). *See also* Ariz. Op. Att’y Gen; I90-071 (August 14, 1990); AIA Constitution (recognizing the AIA as a nonprofit, voluntary membership association of high schools).

Because the AIA is not a “public” entity, the judge’s relationship to it in his officiating capacity does not violate Article 6, §28. And, in any event, the facts presented here negate any employment relationship between the judge and the AIA.

In sum, Article 6, §28 does not proscribe the judge’s officiating activities for public high schools under the current arrangement. In addition, this section clearly has no effect on the judge’s officiating of sporting events for private schools or for private youth and adult leagues, through PIHRA, Pop Warner, or otherwise.

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We next address whether the Code of Judicial Conduct precludes any of the judge's officiating activities and, with certain qualifications, conclude that it does not. Those activities are not inconsistent with Canon 2A, which requires a judge to "act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." As the commentary to that canon notes, "[t]he prohibition against behaving with impropriety or the appearance of impropriety applies to both the professional and personal conduct of a judge." It further states: "The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired." The judge's officiating activities do not reasonably give rise to any such perception.

Nor do the judge's officiating activities implicate Canon 4A, which requires a judge to conduct all extra-judicial activities so that they do not cast reasonable doubt on the judge's capacity to act impartially as a judge, demean the judicial office, or interfere with the proper performance of judicial duties. As the commentary to that canon states: "Complete separation of a judge from extra-judicial activities is neither possible nor wise; a judge should not become isolated from the community in which the judge lives." In our view, the judge's desire to officiate is not only commendable but also fully compatible with the spirit of that comment.

Similarly, Canon 4B permits a judge to participate in extra-judicial activities concerning "non-legal subjects," subject to the code's requirements. In addition, "[a] judge may participate in civic . . . activities that do not reflect adversely upon the judge's impartiality or interfere with the performance of the judge's judicial duties." Canon 4C(4). In sum, the code does not specifically prohibit, and implicitly permits, the judge's officiating activities, so long as they do not reflect adversely on his impartiality, interfere with the performance of his judicial duties, or otherwise violate any of the code's provisions.

With respect to the issue of compensation, the code permits a judge to "receive compensation and reimbursement of expenses for the extra-judicial activities permitted by this code, if the source of such payment does not give the appearance of influencing the judge's performance of judicial duties or otherwise give the appearance of impropriety." Canon 4H(1). Compensation must not exceed a reasonable amount or what a non-judge would receive for the same activity. Canon 4H(1)(a). In addition, expense reimbursements must be limited to the actual cost incurred by the judge. Canon 4H(1)(b). Based on the facts presented here, the method, source, and amount of compensation the judge receives for his officiating activities comply with these provisions.

Applicable Code Sections

Arizona Code of Judicial Conduct, Canons 2A, 4A, 4B, 4C(4), 4H(1), 4H(1)(a) and 4H(1)(b) (1993).

Other References

Arizona Constitution, Article 6, §28.

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Santiago v. Phoenix Newspapers, Inc., 164 Ariz. 505, 794 P. 2d 138 (1990).

Tiffany v. Arizona Interscholastic Ass'n, Inc., 151 Ariz. 134, 135, 726 P. 2d 231, 232 (App. 1986).

Arizona Judicial Ethics Advisory Committee, Opinions [79-02](#) (Oct. 24, 1979); [88-02](#) (March 11, 1988); [94-09](#) (Aug. 1, 1994).

Arizona Attorney General Opinions I89-010 (Jan. 25, 1989); I90-071 (Aug. 14, 1990).

Restatement (Second) of Agency § 220 (1958).